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No. 04-480

IN THE
SUPREME COURT OF THE UNITED STATES

METRO-GOLDWYN-MAYER STUDIOS INC., *ET AL.*,

Petitioner,

v.

GROKSTER, LTD., *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF INTEL CORPORATION AS *AMICUS CURIAE* SUPPORTING AFFIRMANCE

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INTEREST OF INTEL

Intel Corporation is the world's largest semiconductor manufacturer.[1] Among other things, it provides the "digital building blocks" at the heart of the worldwide digital economy, including desktop, mobile, and server computers, digital entertainment devices, and networking and communications products.

Intel has been a technical innovator for over 30 years and has a significant interest in robust intellectual property protection. Throughout its history, a history that parallels the digital revolution that has reshaped the American economy over the last quarter century, Intel has consistently developed new technologies that stimulate creativity and allow businesses and consumers to create, locate, manage, and manipulate information. Intel and its founders have pioneered many of the key technologies that have enabled the digital revolution, including the integrated circuit, DRAM, the microprocessor, and non-volatile memory, all of which were designed for lawful purposes, but can be put to unlawful uses, including copying content without permission of the owner. Society has benefited from the availability of such technologies, which have been incorporated into products ranging from video tape recorders to digital audio and video players to computers to hard disk drives to mobile telephones.

As the owner of a vast array of copyrighted works, Intel is acutely aware of the importance of protecting copyrights as an incentive to creativity. Intel employs more than 8,000 software engineers whose efforts are dedicated to generating

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[1] Petitioners and Respondents have filed letters with the Court consenting to all amicus briefs. No party to this case authored any part of this brief and no person or entity, other than amicus Intel, made any monetary contribution to it.

copyright-protected software. Intel develops and markets a wide variety of software development tools, such as compilers, software libraries, and code analyzers, that aid software developers in optimizing the performance of their applications. According to the U.S. Patent and Trademark Office, Intel is the fourth most prolific U.S.-based producer of patentable technologies; its ubiquitous trademark symbolizes innovation in the technology world.[2]

Intel also respects, and works to protect, the intellectual property rights of others. It has played and continues to play a central role in various content protection initiatives and has helped to develop robust content protection technologies for use with DVDs and other optical technologies used to store, access, and transmit digital media content.[3] Intel's voluntary participation and substantial investment in these industry-led

[2] According to an annual survey by Interbrand Corp., Intel has the fifth most valuable brand in the world. *See* Don Clark, *Addressing Past Glitches, CEO-To-Be Paul Otellini Sees Future in New "Platforms,"* The Wall Street Journal, January 12, 2005, at B1.

[3] Intel has played an active role in creating the DVD Copy Control Association, which provides the protection system for DVD videos. Intel is a member of (a) the entity that developed and licenses Copy Protection for Prerecorded Media (CPPM), designed to protect digital music, and Copy Protection for Recordable Media (CPRM) (CPRM protects copyrighted music and video stored on recordable digital media); (b) the body that developed and licenses Digital Transmission Content Protection (DTCP), which protects valuable content transmitted over various local connections, including home networks; and (c) the recently formed Advanced Access Content System to protect digital content, such as high definition video, on newly emerging high capacity optical discs. In addition, Intel developed and licenses High-bandwidth Digital Copy Protection (HDCP) to protect digital video output from set top boxes and PCs to new high definition digital displays. Intel's investment of technology, personnel, and other resources in these efforts to protect valuable entertainment content reflects Intel's deep commitment to develop a protected market in digital content.

efforts helps Petitioners and other content owners protect their intellectual property rights.

Intel also recognizes that the law limits the scope of intellectual property protection and does not believe that existing law permits the dramatic expansion of secondary liability urged by Petitioners.

Expanding the scope of secondary liability for products that are capable of substantial noninfringing uses would chill innovation and stifle the development of new generations of Intel's products, including products designed to enhance lawful access to copyrighted works. Intel invests billions of dollars annually in the development of new products.[4] The products Intel develops and the products that other technology companies develop using components designed and manufactured by Intel are essentially tools that, like any tools, are capable of being used by consumers and businesses for unlawful purposes. Dramatically expanding secondary liability law, as urged by Petitioners and their supporting amici, would cause vast uncertainty, curbing investment in new technologies that *might* be put to infringing uses, all to the detriment of the public and the economy.

Imposing on innovators, such as Intel, an obligation to anticipate potential uses of their innovations, to correctly guess which uses will predominate, and then to design their technologies to prevent infringing uses (even if it were technically and practically feasible to do so) would stifle innovation and dramatically increase the cost of such technologies and of the consumer and enterprise products based on those technologies. This would result in timidity in innovation and would not serve the copyright law's purpose

[4] In 2003, Intel spent $4.4 billion on research and development; it expects to spend $5.1 billion on research and development in 2005.

of encouraging innovation for the benefit of the public and U.S. economy.

Intel files this amicus brief to emphasize the chilling effect on innovation that would flow from adopting Petitioners' proposed radical departure from the clear holding of *Sony*.

SUMMARY OF ARGUMENT

Intel condemns the unauthorized sharing of copyright-protected computer files and would neither be surprised nor troubled if Respondents were ultimately found liable as secondary copyright infringers. But the facts on which such a finding might be predicated are not before this Court. Because Petitioners principally sought prospective injunctive relief in the trial court, that court considered only whether the then-current versions of Respondents' products and services subjected them to liability. The trial court expressly did not reach whether either Respondent was liable for damages arising from past versions of its software or from other past activities. Accordingly, the "bad acts," which are the cornerstone of Petitioners' case, were not before the Ninth Circuit on interlocutory appeal and they are not before this Court. They remain before the trial court.

Setting aside the facts not before this Court, Petitioners are left urging this Court to overturn the clear rule of law announced in *Sony*, though they do not admit that they are doing so. In the trial court, Petitioners did not dispute that Respondents' technology was being used and could be used for substantial noninfringing purposes. Petitioners do not seek to upset that factual finding. Based on that finding, it is impossible to reconcile the relief requested by Petitioners with the unambiguous holding of *Sony*; that is, that the sale of a staple article of commerce does not constitute

contributory infringement so long as the product is capable of substantial noninfringing uses.

The clear rule of law this Court announced in *Sony* has served the nation well for more than 20 years. Intel, which provides the digital building blocks at the heart of the information economy, and other technology innovators have relied on the *Sony* rule in developing and deploying digital technologies that, though designed for noninfringing uses, could be put to infringing uses. The various tests proposed by Petitioners would require an inventor to predict, at the time it creates a new product, not only how people will use a product that has yet to be designed, let alone introduced in the marketplace, but also which of the various potential uses will ultimately predominate over the other potential uses. Such predications are impossible in the real world, especially since the uses to which products are put routinely change over time.

Digital technologies are by their nature copying technologies; there will always be a risk that any digital technology, however well intentioned its designer, will be put to infringing uses. Faced with impossible predictions about how as yet undeveloped technologies might be used, ambiguous tests that would be unpredictable in their application, and nearly limitless statutory damages for guessing wrong about the unknowable, innovators, such as Intel, would grow timid. It would be irrational to bring new products to market in the face of massive uncertainty; innovators, such as Intel, would have no choice but to withhold from the market socially and economically useful products. The national economy, which has grown through technological innovation over the 20 years since this Court decided *Sony*, would suffer.

Even if Petitioners were correct in arguing that *Sony* should be revisited, this is not the time or case in which to do

so: (1) The issues Petitioners ask this Court to resolve have not percolated sufficiently in the lower courts; the tests Petitioners propose to substitute for the tried-and-true *Sony* test are completely untried in the courts. (2) On the facts actually presented, there is no split in the circuits that this Court needs to resolve. (3) Precedent, such as the clear precedent of *Sony*, has particular weight where, as here, businesses, individuals, and even Congress have made decisions in reliance on that settled precedent. (4) Time and market forces may well solve the file sharing problem without the Court having to fundamentally revamp secondary infringement jurisprudence.

The Court should reaffirm its decision in *Sony*, a decision that has served the nation well.

ARGUMENT

I. The Trial Court Ruling Under Review Was Narrowly Focused on Whether, on the Undisputed Facts, Either Respondent Was Liable as a Secondary Infringer Based on Distribution of the Then-Current Versions of Their Software. On That Undisputed Record, There Is No Basis to Reverse the Ninth Circuit's Decision

Intel condemns unauthorized sharing of copyright-protected files. Assuming the evidence before the trial court is as described by Petitioners, Respondents may ultimately be found liable for contributory infringement in the trial court. But this case comes before this Court on interlocutory review of entry of summary judgment on a narrow issue unrelated to Respondents' troubling past conduct: whether Respondents could be found secondarily liable for copyright infringement based solely on the distribution of the then-current versions of their software. Since the Court's review is limited to the question resolved by the trial court, affirmance is required.

The many alleged bad acts argued persuasively by Petitioners remain before the trial court and must be addressed there before they may be properly brought before this Court.

The alleged bad acts argued at length by Petitioners were not before the trial court on the parties' cross-motions for summary judgment, they were not before the Ninth Circuit on the question certified by the trial court for interlocutory review, and they are not before this Court. Those facts remain before the trial court.

1. Because Petitioners principally sought "prospective injunctive relief" in the trial court, that court considered: "only whether the *current versions* of Grokster's and StreamCast's products and services subject[ed] either party to liability." Pet. App. 27a-28a. The trial court did not "reach the question whether either [Respondent was] liable for damages arising from *past* versions of their software, or *from other past activities*." *Id.* at 28a (final emphasis added).

2. The bad acts, all past activities, argued at length by Petitioners, though certainly troubling and perhaps damning, were not before the trial court on the narrow issue on which it granted summary judgment: whether, on the undisputed facts before the trial court, distribution of the then-current versions of Respondents' software subjected either Respondent to liability as secondary infringers, liability on which prospective injunctive relief could have been predicated.[5] The Ninth Circuit clearly recognized the limited

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[5] As Petitioners' acknowledged in seeking certification of the trial court's order for interlocutory review, the trial court "severed the issues as to Grokster's and Streamcast's 'current versions' and decided them separately from issues as to those defendants' past versions and conduct." Reply in Support of Plaintiffs' Motion for Entry of a Partial Final Judgment Under Fed. R. Civ. P. 54(b) and for Certification of the April 25 Order for Immediate Appeal Under 28 U.S.C. § 1292(b) at 11, *MGM*

scope of its interlocutory review: "the district court granted the [Respondents] partial summary judgment as to liability arising from *present activities* and certified the resolved questions for appeal pursuant to Fed. R. Civ. P. 54(b)." Pet. App. 4a (emphasis added). The bad acts, all *past* activities, argued at length by Petitioners were not before the trial court, they were not before the Ninth Circuit, and they are not before this Court.

3. The Ninth Circuit found that there was no genuine issue of fact as to whether that Respondents' technologies were capable of substantial noninfringing use and therefore affirmed the trial court's narrow summary judgment: "the district court found it undisputed that the software distributed by each defendant was capable of substantial noninfringing uses. . . . A careful examination of the record indicates that there is no genuine issue of material fact as to noninfringing use." Pet. App. 10a-11a. This finding is fully consistent with the holding in *Sony* that a product need merely be capable of substantial noninfringing use for the staple-article-of-commerce doctrine to apply. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984) ("*Sony*").

4. Petitioners correctly state that contributory infringement "can take two forms: (1) provision of a device or service that makes infringement possible, and (2) active encouragement or assistance of infringement." Brief For Motion Picture Studio and Recording Company Petitioners ("Studio/Label Brief") at 24-25. But evidence that Respondents "have actively encouraged and assisted their users' direct infringement," *Id.* at 25, if there is such, remains before the trial court. The trial court explicitly reserved

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Studios, Inc. v. Grokster, Ltd., 259 F. Supp. 2d. 1029 (C.D. Cal. 2003) (No. 08541).

ruling on the legal consequences of these bad acts because Petitioners principally sought "prospective injunctive relief" in the trial court. Pet. App. 27a-28a. Therefore, the only issue before this Court is whether, on the record established in the trial court, Respondents are secondarily liable for infringement based on their "provision of a . . . service that makes infringement possible."

5. Since it appears from Petitioners' briefs before this Court that these bad acts are the cornerstone of Petitioners' case, Petitioners erred in urging this Court to review this case at this juncture. They should instead have proceeded to trial or renewed their motion for summary judgment on the facts that remain before the trial court.

II. The Rule of Law Announced in *Sony* Has Served the Country Well for More Than 20 Years; To Adopt any of the Various Tests Urged by Petitioners Would Require Overruling *Sony*

Setting aside the facts that are not before this Court, what Petitioners are asking this Court to do is to condemn a technology that Petitioners, in the trial court, *did "not dispute . . . is being used, and could be used, for substantial noninfringing purposes."* Pet. App. 34a (emphasis added). Neither Petitioners nor the amici who support Petitioners seem to argue that this Court should upset that unequivocal factual finding by the trial court. Instead, they argue that Respondents should be found liable *despite* that factual finding. Though they pretend to advocate adherence to the teachings of *Sony*, Petitioners are, in fact, asking this Court to reverse the unambiguous holding of *Sony*. And they ask this Court to do so based on facts that were not before the trial court on the narrow question it addressed on summary judgment.

A. Petitioners' Arguments Cannot Be Reconciled With *Sony*

While feigning allegiance to *Sony*, Petitioners urge this Court to depart from the unambiguous, settled *Sony* test, a test that has served innovators, the public, and the U.S. economy well for more 20 years.

1. In *Sony* this Court held that "the sale of copying equipment, like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, *it need merely be capable of substantial noninfringing uses*." *Sony*, 464 U.S. at 442 (emphasis added).

The Court recognized that the law does not impose secondary liability on product manufacturers simply because their products may be used for infringing purposes. The Court rejected the respondents' attempt to leverage their copyrights to restrict the sale of VTRs: "[t]he staple article of commerce doctrine must strike a balance between a copyright holder's legitimate demand for effective—not merely symbolic—protection of the statutory monopoly, and the rights of others freely to engage in substantially unrelated areas of commerce." *Id.* In striking this balance, the Court specified that the trier of fact *must* take into account a product's capabilities as well as its actual uses, holding that a product need "merely be capable of substantial noninfringing uses" for its distribution to be protected.

Applying the test to the facts of the case, the Court said that "[t]he question is thus whether the Betamax is *capable of commercially significant noninfringing uses*." *Id.* (emphasis added). The Court found that "one potential use of the Betamax" – time shifting of programs for private use in the home – "plainly satisfie[d]" that standard. *Id.* Accordingly,

the Court concluded that Sony was not secondarily liable, even though it was undisputed that Sony provided the means for users to directly infringe and that the reproduction of copyrighted materials was either "'the most conspicuous use'" or "'the major use'" of the Betamax product.[6]

2. Petitioners contend that the Ninth Circuit erred by applying the very test articulated by this Court in *Sony*. The "'mere capability' test," Petitioners argue, "cannot be squared with *Sony-Betamax* or the principles that underlie it." Studio/Label Brief at 35. But, of course, the test that Petitioners say cannot be squared with *Sony* is precisely the test enunciated by this Court in *Sony*: the distribution of a product that facilitates copying, "like the sale of other articles of commerce, does not constitute contributory infringement if the product is widely used for legitimate, unobjectionable purposes. Indeed, it need merely be *capable* of substantial noninfringing uses." *Sony*, 464 U.S. at 442 (emphasis added). The Court should reject Petitioners' invitation to ignore the unequivocal holding of *Sony*.

3. Petitioners also urge the Court to depart from the bright-line, capable-of-a-substantial-noninfringing-use test announced in *Sony* because the *Sony* Court allegedly "faced

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[6] *Sony*, 464 U.S. at 428. Indeed, in oral argument before this Court, counsel for respondents Universal and Disney alleged that, in addition to distributing the Betamax, there was evidence that Sony was "selling [the Betamax] for the primary purpose of recording copyrighted works off the air, including copyrighted works owned by the Respondents; and that the advertising and selling activities, as well as the instruction manuals, which give very detailed instructions as to how to record television programs off the air, exhort and contribute to this copying." *See* Transcript of Oral Arguments in *Sony Corp. of Am. v. Universal City Studios, Inc.*, No. 81-1687, 1983 U.S. TRANS. LEXIS 10 at *40 (October 3, 1983) (hereafter, "Sony Oral Arguments"). The Court nonetheless found that Sony's conduct did not give rise to secondary liability.

an all-or-nothing choice" that is not present here. Studio/Label Brief at 33-34. This argument is flawed, both factually and legally.

First, this Court did not face an all-or-nothing choice in *Sony*: the content owner respondents in *Sony* advocated, and the dissent endorsed, the very sort of filtering that Petitioners now ask this Court to mandate.[7] The *Sony* majority rejected this approach. Second, there is no empirical evidence that the filtering proposed by Petitioners can practically and effectively be applied; indeed the only evidence is that filtering is imperfect, at best. In any event, filtering technology, like any software product, can be circumvented by hackers. Under the approach suggested by Petitioners, technology providers and the courts that would be called on to supervise their filtering efforts would be caught in an endless and constantly escalating game of cat-and-mouse, with hackers cracking each new filtering mechanism the technology companies devise and the courts deciding what additional filtering measures the law requires in response to the latest hack. Third, even if a filtering mechanism could be devised that would thwart every potential act of infringement, mandating inclusion of such mechanism in

[7] *See* Brief for Respondents Universal City Studios, Inc. and Walt Disney Productions, at n.4 (No. 81-1687), *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), *available at* 1981 U.S. Briefs LEXIS 1687 (October 27, 1982) ("Universal/Disney Brief") (arguing that, to protect respondent copyright owners' property, "the sale of VTRs need not come to a halt" because, for example, the Court could grant "an order requiring a technological modification of VTRs which prevents recording of respondents' copyrighted programs (and those of other objecting program owners) but permits recording of all other programs"). *See also Sony*, 464 U.S. at 494 (Blackmun, J., dissenting) ("Remedies may well be available that would not interfere with authorized time-shifting at all. . . . Sony may be able, for example, to build a VTR that enables broadcasters to scramble the signal of individual programs and 'jam' the unauthorized recording of them.").

products that are otherwise capable of a substantial noninfringing use would add a new right of copyright – the right of a copyright holder to dictate the design of a staple article of commerce – a right found no where in copyright law and a right Congress has consistently refused to create. Finally, of course, such an approach is contrary to this Court's holding in *Sony*, which did not limit application of the staple-article-of-commerce doctrine to technologies that are used for fair-use purposes. *See Sony*, 464 U.S. at 442 (finding that the Betamax was capable of commercially significant noninfringing use ". . . *both* (A) because respondents have no right to prevent other copyright holders from authorizing [time-shifting] for their programs, and (B) because the District Court's factual findings reveal that even the unauthorized home time-shifting of respondents' programs is legitimate fair use") (emphasis added).

B. The Various Alternative Tests Proposed by Petitioners Contradict the Settled Law of *Sony*

Petitioners do not propose a rule of law with which this Court could replace the clear rule announced in *Sony*. Instead, what emerges from the mishmash of tests that Petitioners urge on the Court (the Motion Picture Studio and Record Company Petitioners seem to endorse at least three different tests) is a sense that it does not really matter what the rule of law is so long as it requires reversal. But it does matter what the rule of law is. It matters a lot.

1. Petitioners urge the Court to overrule the unambiguous holding of *Sony* and to impose secondary infringement liability on the manufacturer or distributor of a product that is admittedly capable of substantial noninfringing uses anytime the infringing uses of the challenged product are the "primary or principal" uses to which the product is put. Studio/Label Brief at 31.

This "primary use" test is nowhere to be found in *Sony*. To the contrary, *Sony* indicates that a court need not quantify, or even explore, all of the different potential uses of a product to determine if it is capable of substantial noninfringing uses: "In order to resolve th[e] question [of whether the Betamax is capable of commercially significant non-infringing uses], we need not explore *all* the different potential uses of the machine. . . . Rather, we need only consider whether on the basis of the facts as found by the district court a significant number of them would be noninfringing." *Sony*, 464 U.S. at 442.[8] Nowhere does the Court say that the noninfringing uses must be "primary" or "principal" for a product manufacturer to avoid liability; only that the product must be *capable* of substantial or commercially significant noninfringing use.

Here, the district court found, as a factual matter, that *Petitioners did "not dispute that [Respondents'] software is being used, and could be used, for substantial noninfringing purposes."* Pet. App. 34a (emphasis added). These uses included the distribution of thousands of music files from bands that encourage the sharing of their works over the Internet, as well as distribution of thousands of public domain works. The fact that Respondents' software was both capable of and was actually being used for these purposes clearly supports the lower courts' finding that the *Sony* standard applies, regardless of whether these uses are "primary" or "principal."

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[8] In fact, the content owner respondents in Sony pointed out that the record established substantial *infringing* uses of the Betamax: "The district court expressly found pervasive librarying activities and the uncontroverted survey evidence established that 69% to 75% of all Betamax owners maintain large libraries of off-the-air recordings and that the vast majority of programs in those libraries are copyrighted motion pictures." Universal/Disney Brief at n.11.

2. Petitioners also suggest that liability for indirect infringement should be imposed, regardless of *Sony*, on any manufacturer that fails to adopt available mechanisms to prevent foreseeable infringing uses of its products.[9] Studio/Label Brief at 32. There is nothing in *Sony* or in the staple-article-of-commerce doctrine that requires a manufacturer of a product to take affirmative steps to anticipate potential infringing uses of its product and to design mechanisms to protect against such uses. Indeed, in *Sony* this Court rejected the copyright owners' contention that Sony should have been held liable for failing to adopt technology to prevent the VTR from recording copyrighted programs.[10] *Sony* is clear: a product that is capable of substantial noninfringing use need not be modified to prevent potential infringing uses.

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[9] Petitioners contend that Respondents should be held liable as vicarious infringers because they "could limit" infringement through technological means. Studio/Label Brief at 42. There is nothing in traditional principles of vicarious liability that suggests that a manufacturer must somehow *create* the right, and design its products to give it the ability, to control the use of its product in order to avoid liability for vicarious infringement. As noted by the United States, "[t]he imposition of an independent obligation to arrange one's products or relations in a way to permit the seller to retain control" is not supported by precedent and "would have the undesirable effect of chilling technological innovation and constraining the product development options of developers of software and other digital technologies." Brief for the United States as Amicus Curiae Supporting Petitioners ("Solicitor General's Brief") at 19-20, n.3.

[10] *See* Universal/Disney Brief at n.97 ("Not only did petitioners blatantly foster VTR copying, but they affirmatively sought to counteract attempts to discourage such behavior. For example, when Sony learned that television broadcasters could broadcast a jamming signal to prevent VTR copying, Sony immediately studied and discovered a method to override the jamming signal.").

3. The "*Aimster* test," highlighted by Petitioners in their petition for certiorari, would be a radical departure from this Court's holding in *Sony* and should be rejected.

The economic balancing test posited by Judge Posner in *Aimster* would require innovators to show that it would be "disproportionately costly" to eliminate or reduce substantially the potential infringing uses of a product to avoid liability as a contributory infringer. The test would further require developers to assess how "probable" the noninfringing uses of a product are. *In re Aimster Copyright Litigation*, 334 F.3d 643, 653 (7th Cir. 2003). Like the various tests proposed by Petitioners, this proposed test was forged in a factual vacuum and has never been applied by any court to any set of facts. The court's discussion of potential noninfringing uses that Aimster could have shown (but did not) was irrelevant to the court's decision. The court held that Aimster had not met its burden of producing evidence that its product had *any* noninfringing uses, substantial or otherwise.[11] Thus, the court decided the case on the basis that Aimster had proffered *no* evidence of *any* substantial noninfringing use and never reached the speculative balancing test it postulated.

The *Aimster* test is factually untested and would be unworkable if applied to the real world of product development – indeed, it would require an innovator to have a crystal ball. Unlike the well-established and reliable test of *Sony*, it would require innovators to anticipate often unforeseeable infringing uses to which their inventions,

[11] *Aimster*, 334 F.3d at 652-653 ("[T]he evidence is sufficient . . . to shift the burden of production to Aimster to demonstrate that its service has substantial noninfringing uses. . . . Aimster has failed to produce any evidence that its service has ever been used for noninfringing use. . . . We have to assume for purposes of deciding this appeal that no such evidence exists. . . .").

however well intentioned, might be put and, in many cases, to design ways to prevent such uses. This approach contradicts the clear, bright-line approach of *Sony* and, for the reasons discussed in Section III, below, would stifle innovation and materially disrupt the U.S. economy.

4. The United States urges this Court to adopt a test that would weigh the "commercial significance *to the defendant's business* of the noninfringing use in comparison to the infringing use." Solicitor General's Brief at 17. This proposed test is not a refinement of the "mere capability" test articulated in *Sony*; it is a renunciation of *Sony*. And it imposes on innovators the impossible burden of anticipating the commercial significance of a product that has not yet been brought to market. *Sony* does not support such a crystal-ball test, a test that attempts to compare the *quantity* of a future product's potentially unforeseeable infringing uses for purposes never imagined by the innovator, to its anticipated noninfringing uses, which may never even materialize as anticipated. If the product is *capable* of substantial noninfringing uses, the staple-article-of-commerce doctrine applies and the distributor is not obligated to anticipate the infringing uses to which its product might be put.

In contrast to the predictable results that flow from the bright-line *Sony* test, the test proposed by the United States would be virtually impossible to apply. As the United States admits, a product's uses may change over time. *Id.* at 12-13. How would a court determine which sales, at what price, should be attributed to infringement when some people use the product to infringe, some make noninfringing uses, some do both, and the ratio of infringing to noninfringing uses shifts over time, even with respect to a single user? Over what period of time should viability of the business be examined? Is it even possible to segregate expenses related to infringing and noninfringing uses since businesses scale

expenses to projected revenue? How would the proposed test apply to technologies distributed by individuals, academics, and non-profit entities, or to money-losing start-up businesses, none of which are "commercially viable" no matter how much noninfringing use is made of their technologies? How would the test be applied to products produced by large businesses that do not break out revenues and expenses by divisions, let alone by products? Would the test mandate particular accounting treatment, as well?

The test proposed by the government would replace the predictability of the *Sony* analysis with an unwieldy set of questions, unpredictable in application, that would require an innovator to determine, while designing a product, the economics of a product that does not yet exist in a market segment that does not yet exist. The resulting uncertainty would chill innovation to the detriment of the public.

III. Undermining the Bright-Line Test Announced in *Sony* Would Chill Innovation and Profoundly Impede the Economic Growth That Innovation Has Fostered During the More Than 20 Years Since This Court Decided *Sony*

The bright-line test established in *Sony* recognized the difficulty of anticipating, at the time that a given technology is being developed, the uses to which that technology might ultimately be put. Renouncing the certainty and predictability of the *Sony* test in favor of the massive uncertainty that would flow from the alternative tests being proposed by Petitioners and their supporting amici would chill technological innovation.

A. The History of the Last Quarter Century, and of the Digital Revolution and Economic Expansion That That Revolution Caused, Bear Out the Wisdom of This Court's *Sony* Decision

1. The Court's decision in *Sony* has helped to make possible the dramatic technological advancements that made the latter half of the 1990s "a pivotal period in American economic history." *See* Alan Greenspan, Remarks Before the National Technology Forum, St. Louis, Missouri (via videoconference) (April 7, 2000), *available at* www.federalreserve.gov/boarddocs/speeches/2000/20000207.htm. Industry has been able to rely on the bright-line test established by *Sony* to develop innovative technologies, which in turn have revolutionized the way goods and services are produced and distributed and have opened the door to expanded business and productivity growth rates. *Id.* Under the rule created by *Sony*, product developers have been able to determine objectively whether a technology has or is capable of substantial noninfringing uses, and can confidently bring to market products that pass this test.

2. The development of innumerable technology-based products has depended on the *Sony* rule and its erosion would chill innovation and put a damper on one of the largest components of the U.S. economy: computer, software, consumer electronics, and telecommunications companies, many of whose products and services are built on technologies developed by Intel, contributed some $844 billion to the U.S. Gross Domestic Product in 2003.[12] Examples of products developed in reliance on the principles of *Sony* include Internet servers, computer hard drives, DVRs, DVD players, the iPod, and innumerable other

[12] Department of Commerce, Bureau of Economic Analysis, Gross-Domestic-Product-(GDP)-by-Industry Data, *available at* http://www.bea.gov/bea/dn2/gdpbyind_data.htm.

products, including, of course the VCR. Even the personal computer might not have developed as it has (low and consistently decreasing cost, rapidly increasingly power and ease of use) if this Court in *Sony* had subjected innovators to the massive uncertainty and intolerable risk that would flow from the various tests urged by Petitioners, rather than the bright-line test this Court announced.

3. Petitioners argue that allowing Respondents to invoke the *Sony* defense would "undermine[] the fundamental purpose of copyright protection without a countervailing benefit in any legitimate area of commerce." Studio/Label Brief at 31. What Petitioners fail to recognize is the enormous societal benefit that has flowed from the ability of technology innovators, such as Intel, to rely on the predictable *Sony* test and therefore to be free to innovate without fear that their innovations, however well intentioned, might be put to infringing uses. This is exactly the benefit this Court preserved in *Sony*, and it should not be disturbed.

B. If This Court Were to Reject *Sony* in Favor of One or More of the Alternative Tests Urged by Petitioners and Their Supporting Amici, Intel and Other Technology Innovators Would Innovate Less Since Uncertain Liability Standards Would Present Irrational Risks

Petitioners and their amici urge this Court to adopt various alternative tests that would require product manufacturers to predict and quantify the infringing and noninfringing uses to which products they have not yet invented, let alone brought to market, might be put. Innovators cannot, at the time they are innovating, anticipate all the uses to which their inventions may ultimately be put, and they most certainly cannot anticipate which of those uses will predominate and which of those uses will give rise to more successful business models. The tests proposed by

Petitioners and their supporting amici would require such prescience, prescience that is not attainable in the real world.

1. The tests urged by Petitioners would require an inventor to predict at the time it creates a new product not only how people will use a product that has yet to be designed, let alone introduced in the marketplace, but which of the various uses to which the product might be put would predominate over the other potential uses. Such predictions are impossible, particularly since the uses to which technologies are put change over time. Time-shifting may have been the "primary" use of VCRs when this Court decided *Sony*, but time-shifting was quickly eclipsed by viewing of pre-recorded tapes as the primary use of VCRs. Edison invented the phonograph as a dictating machine that he thought would make letters obsolete. The inventors of the laser sought a tool to help study molecular structure; lasers are now used to perform eye surgery, to cut metal, to measure distances, and to scan bar-codes in supermarket checkouts, among other things. Bell designed what became the telephone not to carry voice communications but to carry multiple telegraph signals simultaneously. One cannot but wonder whether the inventors of these devices would have risked massive liability to introduce their inventions to the market if they had had a legal obligation to anticipate all the uses to which their inventions might be put, to assess whether any of these uses might infringe the rights of copyright holders, and, if so, whether these potential infringing uses might predominate over their intended noninfringing uses. (Of course, since they were all wrong about how their inventions would be used, they could not possibly have guessed right about which foreseeable uses would predominate over which other foreseeable uses.)

2. The penalty on a product manufacturer who guesses wrong as to the eventual uses to which its products are put could be crippling. If the inventor were to guess wrong, and

to distribute a product that consumers adapted for infringing purposes more than they used it for the inventor's legitimate, intended purpose, the inventor could be held liable for virtually limitless statutory damages.[13] The vague standards proposed by Petitioners and their supporting amici would be unpredictable in application, resulting in vast uncertainty that would chill the introduction of new technologies. It would be irrational to bring new products to market in the face of such massive uncertainty; innovators, such as Intel, would be forced to withhold from the market socially and economically useful products.

3. Digital technologies are by their nature copying technologies. To access information in a book, one opens the book. But information stored digitally can be accessed only by copying it from stored memory (a floppy disk, CD-ROM, or hard drive, for example) to the computer's active memory or "RAM." There will always be risks that digital technology, however well-intentioned the designer, will be put to infringing uses. The opaque tests urged by Petitioners and their supporting amici would require timidity in innovation, lest a new digital idea be put to an infringing use, thereby subjecting to massive liability the designer that did not design in available mechanisms to prevent infringing uses it could not have imagined.

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[13] For example, Petitioners state that they identified 80,000 different songs being downloaded using the Respondents' software. Studio/Label Brief at 8. Since the infringement of each such work could subject a defendant to statutory damages of up to $150,000 for infringement of the record label's rights in the sound recording, and another $150,000 for infringement of the songwriter's rights in the song, an innovator that created a technology that could be used to infringe the copyrights in these songs, however well intentioned his invention, could be found liable for statutory damages totaling $24 billion. Damages of this magnitude would effectively sink all but the very largest companies, making the risk of guessing wrong about how an invention will be used an irrational gamble for any business to take.

IV. Even If Petitioners Were Correct That *Sony*, Which Has Served the Country Well For Two Decades, Needs To Be Revisited, This Is Neither the Time nor the Case in Which To Revisit It

The summary judgment inquiry in the trial court was narrowly focused. Even if the bad facts stressed by Petitioners had been before the trial court on summary judgment, which they were not, and even if they were therefore before this Court, which they are not, the issues that Petitioners ask this Court to address are not ready to be adjudicated in this Court.

A. The Issues Petitioners Ask the Court to Address Should First Be Developed in the Lower Courts

It is the tried and true practice of this Court to allow lower courts to wrestle with a complex and significant legal issue in various concrete factual settings before attempting to resolve such an issue definitively.[14] This practice of allowing issues to percolate in various circuits and in various states allows the Court to benefit from the experience gained in the various court systems before it propounds a uniform rule that will bind the entire nation.

Petitioners and their supporting amici do not point to conflicting tests that have been applied by lower courts to differing results and explain why one such test ought to be selected over the others. Instead they offer some two dozen

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[14] *See e.g., Lebron v. National Railroad Passenger*, 513 U.S. 374, 407 (1995) (O'Connor, J., dissenting) ("Even where the lower courts are in clear conflict, we often defer consideration of novel questions of law to permit further development."); *Brown v. Texas*, 522 U.S. 940, 940 (1997) (Stevens, J., with Souter, J., Ginsburg, J., and Breyer, J., joining) ("the likelihood that the issue will be resolved correctly may increase if this Court allows other tribunals 'to serve as laboratories in which the issue receives further study before it is addressed by this Court'").

competing tests, none of which has ever been applied by any court to any concrete set of facts.[15] It would be imprudent for the Court to adopt any of the various tests urged by Petitioners and their amici, none of which has ever been used to decide even one case. Renouncing *Sony* in favor of any of these tests would "alter general copyright law in profound ways with unknown ultimate consequences." Pet. App. 21a.

B. On the Facts Actually Presented, There Is No Split in the Circuits to Be Resolved

Petitioners argued at length in their petition for certiorari that this Court must reverse the Ninth Circuit's decision to resolve a conflict in the circuits because the *Grokster* court purportedly reached "diametrically opposed conclusions" on the "same issues" resolved in *Aimster* based on facts that are "exactly" the same. *See* Petition for a Writ of Certiorari at 2, *MGM Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154 (9th Cir. 2004) (No. 04-480) (granted Dec. 10, 2004).

Petitioners fail to appreciate the legally significant factual differences between the centralized search architecture at issue in *Aimster* and the decentralized architecture at issue in *Grokster*. The *Grokster* court explained that, at the time of its decision, there were three principal architectures for indexing files to be searched on a peer-to-peer network:

[15] Of the 30 briefs submitted by Petitioners and their supporting amici, nearly all propose at least one test, many of which differ from one another. These range from the Studio/Label Petitioners' "primary" or "principal use" test, to their failure-to-separate-infringing-from-noninfringing test, to the Songwriters filtering test, to the Solicitor General's central-to-business-model test, to the law professors' test balancing the cost of preventing infringement against the content industry's cost of pursuing individual infringers, to the Kids First ability-to-reach-out-and-alter-a-product test, to the Defenders of Property Rights test importing criminal aiding and abetting as well as tort law principles, to the sports leagues' endorsement of the *Aimster* balancing test, to the Video Software Dealers' obscure B<PL test.

"(1) a centralized indexing system, maintaining a list of available files on one or more centralized servers; (2) a completely decentralized indexing system, in which each computer maintains a list of files available on that computer only; and (3) a 'supernode' system, in which a select number of computers act as indexing servers." Pet. App. 5a.

The Ninth Circuit found that the systems at issue in this case were of the second and third types. Pet. App. 13a. (StreamCast employed a completely decentralized architecture; Grokster used the "supernode" model.) In contrast, Aimster's system fits the Napster, centralized-server model, not the Grokster/StreamCast decentralized models.[16]

So, far from doing "exactly what Grokster and StreamCast do," as Petitioners contend, what Aimster did looks a lot like what Napster did, and what the Ninth Circuit found to be actionable in *Napster I* and *Napster II*. There is no circuit split to be resolved.

C. This Court Has Recognized That Courts Should Be Slow to Expand Copyright Liability to Meet the Challenges Posed by New Technologies

The Court in *Sony* recognized that courts should be slow to expand the reach of secondary liability, since such expansion could discourage technological innovation. *See, e.g., Sony*, 464 U.S. at 431 ("The judiciary's reluctance to expand the protections afforded by the copyright without explicit legislative guidance is a recurring theme.").

[16] *See Aimster*, 334 F.3d at 646 ("A user who wants to make a copy of a file goes online and types the name of the file he wants in his 'Search For' field. *Aimster's server searches* the computers of those users of its software who are online and so are available to be searched for files they are willing to share, and if it finds the file that has been requested it instructs the computer in which it is housed to transmit the file to the recipient. . . .") (emphasis added).

The preference in our legal system for adhering to existing boundaries established by precedent has particular force where, as here, businesses and individuals have, over a protracted period, made decisions in reliance on settled law.[17] Congress has had more than 20 years to alter the Court's decision in *Sony*, and has declined to do so. Industry has come to rely on the *Sony* principles and overruling *Sony* at this point would dislodge settled rights and expectations.

D. The Entertainment Industry Is Resilient and Has Historically Innovated Effectively to Meet the Market Challenges Posed by New Technologies

The entertainment industries have repeatedly predicted that new technologies would destroy their businesses. Although their concerns are understandable, new technologies that are capable of substantial noninfringing use have, over time, benefited both the entertainment industries and the public. For example, professional baseball initially barred radio broadcasts of games out of fear that radio would reduce attendance; the film studios feared that VCRs would be the end of movie theaters (and before that, refused to license theatrical movies for television distribution); the music industry feared that free, over-the-air radio would put record distribution out of business; and the film studios initially resisted the introduction of DVD technology. Ultimately all of these innovations proved enormously profitable to entertainment companies. For example, sales of DVDs now bring the studios more revenue than theatrical

[17] *See Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197, 202 (1991) ("Congress has had almost 30 years in which it could have corrected our decision ... if it disagreed with it, and has chosen not to do so. We should accord weight to this continued acceptance of our earlier holding. *Stare decisis* has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision. . . .").

release of their films: in 2004, DVD sales brought the studios $25.4 billion, nearly three times the $9.4 billion they derived from theatrical release of their films.

Each time a new technology has threatened the end of the content industries, time and market forces have resulted in the content industries profiting from the very technologies they challenged. This Court's wisdom in urging caution before expanding copyright law at the behest of entertainment industry copyright owners has been proved time and again.[18]

E. Time and Market Forces Have Not Been Given a Chance to Work

Time and market forces have not yet had adequate opportunity to respond to peer-to-peer technologies. This Court should allow time for the markets to do so. In particular, the Court should not preempt the development of market-based solutions that may alleviate much of the problem of peer-to-peer systems being used to distribute unauthorized copies of copyrighted works in the relatively near future.

1. For example, copyright owners will have the opportunity to allow copies of their content to be made (or not made), and to place limits on the creation and distribution of such copies, through developing digital rights

[18] *See, e.g., Aimster*, 334 F.3d at 649-50 ("The [Supreme] Court's action in striking the cost-benefit tradeoff in favor of Sony came to seem prescient when it later turned out that the principal use of video recorders was to allow people to watch at home movies that they bought or rented rather than to tape television programs."); Pet. App. 21a ("history has shown that time and market forces often provide equilibrium in balancing interests, whether the new technology be a player piano, a copier, a tape recorder, a video recorder, a personal computer, a karaoke machine, or an MP3 player").

management ("DRM") technologies, the result of industry-led initiatives designed to protect content from unauthorized use while enabling consumers to enjoy that content in ways that match their reasonable expectations.[19] Other technological solutions are on the horizon.

2. As both Congress and the courts have recognized, a market-based approach has been successful in the past and is likely to be so in the future. Indeed, Congress has urged industry participants to investigate market-based solutions first, rather than let lawyers into the design room.[20]

3. As Congress has found: "The Internet and other interactive computer services have flourished, to the benefit

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[19] DRM systems usually encrypt the content to be protected and have a set of rules governing how consumers may use various types of content. For example, FCC-approved DRM systems for DTV are designed to permit the consumer to enjoy DTV content (*i.e.*, make unlimited protected copies, time-shift, library, and space-shift programs) but not to freely distribute those programs over the Internet. Some systems also protect higher-value content, such as HBO movies, by allowing only a single copy to be made and do not allow permanent copies of pay-per-view movies. These technologies are already widely available, but have not, with few exceptions, been widely adopted by the entertainment industries.

[20] In particular, Congress has stated a strong preference for industry to develop technological solutions to protect copyright owners' rights, which this Court should not ignore. As stated by the House Committee on Commerce in connection with the Digital Millennium Copyright Act of 1998: "The Committee believes that technology is likely to be the solution to many of the issues facing copyright owners and service providers in this digital age. . . . The Committee strongly urges all of the affected parties expeditiously to commence voluntary, inter-industry discussions to agree upon and implement the best technological solutions available to achieve these goals." H.R. REP. NO. 105-551 (II) (1998), *in* CR1 Melville B. Nimmer & David Nimmer, NIMMER ON COPYRIGHT: CONGRESSIONAL COMMITTEE REPORTS ON THE DITIGAL MILLENNIUM COPYRIGHT ACT AND CONCURRENT AMENDMENTS, at 1:6-80 (Matthew Bender & Co. ed., 2000).

of all Americans, with a minimum of government regulation." Communications Decency Act of 1996, 47 U.S.C. § 230(a)(4) (1998). This principle has added force where, as here, the technology at issue involves complicated and often competing interests of industry and consumers, which courts and lawmakers may find difficult to balance.

Petitioners are asking this Court to impose on technology innovators the burden of anticipating how users will use their inventions, and of designing to prevent infringing uses, without having even exhausted their own self-help remedies. Petitioners could, for example, release all their music in DVD-audio format, an encrypted format that plays only on compatible DVD players. Intel invested millions in developing the content protection system incorporated into DVD-audio in 1998, but the recording industry has released only a minute fraction of existing music titles in this protected DVD-audio format.

As the Ninth Circuit correctly noted:

> "[W]e live in a quicksilver technological environment with courts ill-suited to fix the flow of internet innovation. The introduction of new technology is always disruptive to old markets, and particularly to those copyright owners whose works are sold through well-established distribution mechanisms. Yet, history has shown that time and market forces often provide equilibrium in balancing interests, whether the new technology be a player piano, a copier, a tape recorder, a video recorder, a personal computer, a karaoke machine, or an MP3 player. Thus, it is prudent for courts to exercise caution before restructuring liability theories for the purpose of addressing specific market abuses, despite their apparent present magnitude."

Pet. App. 21a (citation omitted).

CONCLUSION

For all these reasons, the Court should reject Petitioners' invitations to substantially revamp secondary liability law, particularly when the unattractive facts that the Petitioners have stressed before this Court are still before the trial court.

As this Court noted in *Sony*: "It may well be that Congress will take a fresh look at this new technology, just as it so often has examined other innovations in the past. But it is not [this Court's] job to apply laws that have not yet been written." *Sony*, 464 U.S. at 456. Applying the copyright law, as it now reads, to the facts before the trial court on summary judgment and, therefore before the Ninth Circuit and this Court, the judgment of the Court of Appeals must be affirmed.

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